NSW Law Reform Commission Review of the NSW Guardianship Act 1987

Question Paper 4: Safeguards and procedures
Question Paper 5: Medical and dental treatment and restrictive practices
Question Paper 6: Remaining issues

Submission May 2017

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Dear Mr Cameron

The Office of the Public Guardian (OPG) is pleased to be able to participate in the review of the NSW Guardianship Act.

We welcome the opportunity to respond to the Law Reform Commission papers and to play an active part in the consultation process.

The potential benefits for people with disabilities and older people through the creation of a Public Advocate in NSW is of critical importance when considering the future of guardianship laws in this State. The Public Guardian (OPG) strongly supports the introduction of a Public Advocate to offer a better model of support for people with cognitive impairment. A Public Advocate will be able to assist a great number of people through the provision of advocacy and support without the need for people to have to have a guardian appointed with the consequent loss of legal capacity.

The Public Guardian supports a system that responds to people's situations according to the nature and level of support the person needs rather than the current binary system based on concepts of capacity versus incapacity. Some people may need a great deal of support and may need a substitute decision maker. Others may need varying levels of support to make their own decisions and yet others may have their situation improved or problems resolved through the provision of advocacy.

Having a Public Advocate in NSW will significantly assist towards the development of a system that adequately reflects and represents the needs of people with disabilities and older people in NSW.

Please see attached our submissions in response to Question Papers 4, 5 and 6.

Kind regards

[redacted]

Graeme Smith

PUBLIC GUARDIAN

Question Paper 4: Safeguards and procedures

2. Enduring guardianship

Please see the Office of the Public Guardian's (OPG's) Question Paper 2 submission for comments about enduring guardianship. People with cognitive decline may still be able to participate in decision making and OPG believes enduring guardians should be required to offer decision making support where possible before making substitute decisions.

3. Guardianship orders and financial management orders

Question 3.2: Time limits for orders

(1) Are the time limits that apply to guardianship orders appropriate? If not, what should change?

(2) Should time limits apply to financial management orders? If so, what should these time limits be?

In OPG's Question Paper 3 submission we wrote at 3.5 that OPG 'believes that financial management orders of indefinite length are inconsistent with the principle of least restriction. Legislation could be amended so that financial management orders must be time limited and reviewed.'

Time limits would help financial management laws comply with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). OPG acknowledges the administrative burden this could place on the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT). NCAT would need discretion over appointment terms to ensure orders were suitable to the needs of the person and that NCAT was administratively able to reach the goal of reviewable orders.

Question 3.3: Limits to the scope of financial management orders

Should the Guardianship Act 1987 (NSW) require the NSW Civil and Administrative Tribunal to consider which parts of a person's estate should be managed?

Again, to better comply with the UNCRPD, NCAT needs to be able to tailor the financial management order to the needs of the individual subject to the application and to seek the least restrictive option.

Question 3.4: When orders can be reviewed

(1) What changes, if any, should be made to the process for reviewing guardianship orders?

(2) Should the NSW Civil and Administrative Tribunal be required to review financial management orders regularly?

(3) What other changes, if any, should be made to the process for reviewing financial management orders?

In OPG's Question Paper 2 submission we suggested that non-reviewable orders (orders that expire at the end of the term) should be the primary type of guardianship order made, with reviewable orders the exception, based on evidence of the person's needs.

OPG believes all financial management orders should have a set review date or be made non-reviewable. As with guardianship orders, financial management orders should be made according to the person's individual situation and the length of the order should depend on their individual needs.

We also commented in response to Question Paper 2 that financial managers should be required to assist the person to develop their financial decision making capabilities wherever possible, for example through financial literary skill building. On review of the order, the financial manager should report on what measures were taken during the course of the order to build the ability of the person to participate in decision making.

Inconsistency between current guardianship legislation and the terms of the UNCRPD regarding financial management orders are discussed in Epstein, T., 2011, *Financial Management and the Rights of People with Disability*: A Fine Balance, University of New South Wales Law Journal 34: 835 – 860. The Public Guardian recommends Epstein's examination to the Commission.

Question 3.6: Grounds for revoking a financial management order

(1) Should the Guardianship Act 1987 (NSW) expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?

(2) What other changes, if any, should be made to the grounds for revoking a financial management order?

A person under financial management can rarely demonstrate they have *regained* their capacity. To establish whether the financial management order is in the person's best interest it may be helpful for the legislation to consider the *continuing utility* of the order in the person's life.

The current reference to best interest could be removed and the Act could be amended to allow NCAT to revoke an order both if the person no longer needs it and/or if there is no practical utility in the order's continuation.

5. Holding guardians and financial managers to account

OPG believes guardians and financial managers acting in good faith shouldn't be subject to litigation and that s100 of the Act deals with this matter appropriately.

Below we make further comment about issues relating to the proposed safeguards.

Preference for focus on prevention and education

It is unlikely that a requirement to sign an undertaking to comply with duties would have much effect unless accompanied with information and resources both at the time of and during the appointment.

OPG believes significant resources should go into preventing and avoiding harm in the first instance and then into resolving the situation to the benefit of the represented person.

A Public Advocate could take a leading role in this type of community education.

Discouraging impact on appointments

OPG has concerns about the impact of onerous conditions of appointment. OPG runs a *Private Guardian Support Unit,* which offers information, resources and support to guardians appointed by NCAT, and enduring guardians. The vast majority of guardians perform their roles out of love and concern for the represented person. The role of guardian can be extremely difficult and isolating, particularly so in situations of conflict within families or with service providers, or where the represented person has complex support needs that are not being met and where a great deal of advocacy is required. Onerous reporting requirements and the threat of penalties may discourage individuals from accepting the appointment and are unlikely to result in better quality decision making by guardians.

Existing complaint mechanisms

It is unclear whether the discussion paper is proposing that penalties extend to the Public Guardian. Currently, OPG's decisions are reviewable by the Administrative and Equal Opportunities Division of the NSW Civil and Administrative Tribunal and OPG processes can be examined by the NSW Ombudsman. OPG staff follow national guardianship standards and are bound by the NSW Public Service and Department of Justice code of conducts and relevant laws.

Question 5.1: A statement of duties and responsibilities

(1) Should the Guardianship Act 1987 (NSW) and/or the NSW Trustee and Guardian Act 2009 (NSW) include a statement of the duties and responsibilities of guardians and financial managers?

(2) If so:

(a) what duties and responsibilities should be listed in this statement?

(b) should guardians and financial managers be required to sign an undertaking to comply with these duties and responsibilities?

(b) what should happen if guardians and financial managers fail to observe these duties and responsibilities?

Please refer to OPG's response to Question Paper 3 at 3.5. Guardians and financial managers should seek to build the represented person's ability to participate in decision making to the greatest extent. A responsibility to develop the person's capacity will be most effective if spelt out in legislation rather than expressed as a principle only.

As discussed above in section 3, OPG believes legislation should encourage or require financial managers to take an active role in promoting greater financial independence by the person and developing their financial capability. Financial managers would need education and information to understand and fulfil this role.

Question 5.8: Reviewing decisions and conduct of public bodies

What, if anything, should change about the mechanisms for reviewing the decisions and conduct of the NSW Trustee and Guardian and the Public Guardian?

OPG and NSWTG are subject to the most extensive review mechanisms among guardianship jurisdictions in Australia.

7. Advocacy and investigative functions

OPG believes the role of a Public Advocate should be to assist, investigate and educate. A Public Advocate should replace the OPG and assume its guardianship, individual advocacy and educative functions. It should further be empowered with enhanced responsibilities.

The Public Advocate officer should be appointed for a defined period of time, removable only by Parliament and not be subject to ministerial direction.

Enhanced responsibilities

The Public Advocate could represent the interests of people with cognitive impairment in a variety of ways.

Assist but not make decisions for people with cognitive impairment who are not under guardianship.

The Public Advocate may be able to resolve issues for a person without the need for the appointment of a guardian. This may occur in circumstances where advocacy would result in a positive outcome for the person, such as gaining access to a much needed mainstream service such as social housing, having an NDIS plan reviewed and amended, gaining access to legal support or having access to mediation facilitated. This kind of advocacy support will often result in significant improvement in the person's life without losing their legal capacity.

Vulnerable adults

In some circumstances agencies such as NSW Ombudsman may become aware of situations of suspected abuse that sits outside their area of authority, for example with vulnerable adults not part of the disability service structure. These situations highlight a significant safeguarding gap for vulnerable adults. Currently, the Public Guardian may be asked to consider making an application for guardianship but he has very limited power to seek the information needed to properly determine whether an application should be brought and what sort of order or support might be required.

Pre-application investigation

The Public Advocate could investigate the need for a guardian and explore alternative options to guardianship pre-application.

Participate in court processes

With *amicus curiae* powers the Public Advocate could assist the court where a matter is of broader interest for people with decision making impairment.

The Public Guardian is frequently asked to agree to be appointed as tutor for a person with a disability or litigation guardian in family law matters. The Public Guardian declines this role as he has no indemnity against adverse cost awards. This can often disadvantage a person with cognitive impairment because they cannot bring an action against another legal entity and are therefore denied access to justice.

Investigate complaints about suspect abuse, exploitation or neglect

The Public Advocate should have the power to choose to investigate complaints regarding suspected abuse, exploitation or neglect, on complaint or on the Public Advocate's own motion. This would include concerns about financial abuse and the actions of attorneys under powers of attorney. The Public Advocate may be more effective with powers to:

- compel information during investigation
- seek a warrant to authorise an officer delegated by the Public Advocate accompanied by police officers to search and enter premises in relation to an investigation
- refer complaints across state borders to equivalent agencies
- facilitate referral to and exchange information with relevant bodies on matters affecting the safety of a person with decision making impairment and more appropriately dealt with by other agencies (for example NSW Ombudsman, NSW Police, the NDIS Quality and Safeguards Commissioner)
- incorporate the work of the existing Elder Abuse Helpline and Resource Unit
- have oversight of restrictive practices from a consent (not clinical) perspective. Please see OPG's question 7 in Question Paper 5 below for further discussion about restrictive practices.

Supported decision making facilitation and oversight

Related to investigative powers, the Public Advocate could play an effective role in a supported decision making scheme. This could include

- facilitation of a scheme to connect people with cognitive impairment to supporters
- oversight or regulation of agreements and the ability to investigate complaints about agreements
- education and training, discussed below.

Community education role

The Public Advocate would need to have enhanced community education responsibilities to support its functions. For example, the Public Advocate would need to provide education or training about supported decision making, issues of abuse, issues of risk, promoting alternatives to guardianship, planning ahead and guardianship. Such a role would build on the existing community education responsibilities of the Public Guardian and resources developed in OPG's *Supported Decision Making Phase 2* (SDM2) project.

8. Procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal

Question 8.1: Composition of the Guardianship Division and Appeal Panels

(1) Are the current rules on the composition of Guardianship Division and Appeal Panels appropriate?

(2) If not, what would you change?

OPG strongly supports the continuation of three member panels in new matters and on review for complex matters. The combined knowledge and lived experiences of the legal, professional and community members results in a better process and outcome for the person subject to the application and prevents hearings from becoming focussed on legal issues alone.

Because the Guardianship Division is now part of a broader tribunal it is increasingly difficult for them to maintain an informal and appropriate environment to deal with guardianship and administrative matters. For example, the Guardianship Division is now holding hearings in court houses in regional areas as opposed to less formal and less intimidating sites previously used. Increased formality does not encourage the participation of the person subject to the application.

OPG believes the supported decision making models described within the question papers will require a broadly composed tribunal membership in order to be effective.

Question 8.3: The requirement for a hearing

When, if ever, would it be appropriate for the Guardianship Division to make a decision without holding a hearing?

OPG does not believe it would ever be appropriate for the Guardianship Division to make a decision without holding a hearing. Hearings provide an opportunity for the person subject to the application or order to be involved in decision making about their life and their legal capacity. While the person may choose not to, they should always be afforded the right and opportunity to participate.

Question 8.5: When a person can be represented

When should a person be allowed to be represented by a lawyer or a non-lawyer?

OPG supports the use of separate representation when necessary to enhance the ability of the person subject to the application to participate in the hearing process and for their voice to be heard. OPG supports current arrangements which allow the Guardianship Division to make decisions about whether forms of legal representation are required based on the merits of the individual matter.

Question 8.10: Privacy and confidentiality

What, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases?

Occasionally people under guardianship are identified by others in traditional and social media. OPG believes s101 of the Guardianship Act should be made clearer to afford greater privacy and confidentiality to represented people and to avoid potential exploitation.

Question Paper 5: Medical and dental consent and restrictive practices

2. Capacity to consent to medical and dental treatment

OPG provided views on the introduction of a more formalised system of supported decision making in Question Paper 2. OPG believes decisions about consent should be made in line with the person's expressed will and preferences.

3. Types of medical and dental treatment

Question 3.1: Withholding or stopping life-sustaining treatment

(1) Should Part 5 of the Guardianship Act 1987 (NSW) state who, if anyone, can consent to withholding or stopping life-sustaining treatment for someone without decision-making capacity?

(2) If so, who should be able to consent and in what circumstances?

OPG believes the Act should offer clarity about who can consent to stopping treatment. The current distinction between health care and medical and dental consent functions creates confusion and a level of artifice in addressing consent to treatment at end of life.

At present a guardian must make decisions to promote a person's health and wellbeing, which, if a narrow view is taken, can be difficult to reconcile with some types of treatment at end of life, for example treatment withdrawal. OPG supports NSW Health's collaborative approach to decision making at end of life. Consideration of the person's will and preferences would work well within this approach.

Question 3.2: Removing and using human tissue

OPG supports the need to update legislation to keep pace with changes in medical practice. OPG has no particular view about who should consent to the removal and use of human tissue, so long as the practice is clinically relevant, reflects the will and preferences of the person and does not cause them harm or suffering.

Question 3.3: Treatment by a registered health practitioner

Should the definition of medical and dental treatment in Part 5 of the Guardianship Act 1987 (NSW) include treatment by a registered health practitioner?

The current guardianship system ensures people with decision making impairment have access to health care resources. That is, if required, a guardian with a health care function can make health care decisions on behalf of a person under guardianship. This includes decisions about a broad range of health care services.

OPG has no objection to the inclusion of registered nurses, midwives and Aboriginal and Torres Strait Islander health practitioners in the definition of who can provide medical treatment under Part 5. OPG has no experience or knowledge of people with cognitive impairment being denied appropriate treatment by these professionals under current

arrangements, but it is conceivable that urgent treatment by these providers might be needed in some circumstances, particularly in remote areas.

OPG does not support a definition to include, as suggested by NSW Health, *Chinese medicine practitioners, chiropractors, occupational therapists, optometrists, pharmacists, osteopaths, podiatrists, physical therapists and psychologists*. These professions do not provide urgent, life-saving treatment or major treatment.

An expanded definition of treatment would allow these practitioners to disregard a person's objections to treatment under s46(4) of the Act. OPG represents approximately 3500 people with cognitive incapacity each year. The need for medical and dental consent and health care decision making are among the most common reasons for the Public Guardian's appointment. OPG has not observed a need for the suggested amendment and no examples of critical issues have been put forward in support of the amendment.

OPG is concerned that a wide definition of medical treatment within the Act could create an expectation that people with cognitive impairment need substitute consent to access everyday health or supportive services and could lead to a rise in guardianship applications and orders. It could result in the person's objections to minor treatment being disregarded in a very broad range of circumstances.

4. Consent to medical and dental treatment

Question 4.6: Person responsible

(1) Is the "person responsible" hierarchy appropriate and clear? If not, what changes should be made?

(2) Does the hierarchy operate effectively? If not, how could its operation be improved?

OPG believes the *person responsible* hierarchy should specifically include same sex partners in s33A(4)(b), rather than by reference to s21C of the *Interpretation Act 1987*. Research led by Emeritus Professor Colleen Cartwright provides insight into medical practitioners' knowledge of the *person responsible* hierarchy and consent concerning LGBTI people (https://works.bepress.com/colleen_cartwright/)

Question 4.7: Factors that should be considered before consent

Are the factors a decision-maker must consider before consenting to treatment appropriate? If not, what could be added or removed?

Ideally Part 5 would instruct the *person responsible* to make decisions according to the principles of the Act, and in line with any supported decision making features of the Act.

Question 4.9: Supported decision-making for medical and dental treatment decisions

(1) Should NSW have a formal supported decision-making scheme for medical and dental treatment decisions?

(2) If so, what should the features of such a scheme be?

Please refer to OPG's Question Papers 2 and 3 submissions. OPG believes supported decision making principles should be applied to all types of decision making, including medical and dental treatment decisions. All people need information in order to give consent, information provided at their level of understanding at that time. Medical and dental practitioners should not automatically seek out a substitute decision maker simply because the person has cognitive impairment; rather the person should be given the support they need to come to an understanding of the proposed treatment, wherever possible.

A Public Advocate could offer education to the public and health sector about the role of supported decision making. This could lead on from the Public Guardian's effective supported decision making training program, developed as part of the SDM2 project (see www.publicguardian.justice.nsw.gov.au).

6. The relationship between the Guardianship Act and mental health legislation

Voluntary Patients

S7 and S8 of the Mental Health Act (MHA) do not work well together: see Sarah White v the Local Health Authority [2015] NSWSC 417. Slattery J confirmed that a guardian with the relevant function may seek the admission of the person under guardianship to a mental health facility as a voluntary patient even if the person objects. This is because the person has been determined to lack the decision making ability to make that decision for themselves.

If the person is admitted they can subsequently discharge themselves immediately under the S8 provisions. It is illogical to suggest that the person has regained the ability to make such a decision immediately upon admission.

Slattery J acknowledges that such circumstances may arise and that the guardian may again seek the person's admission immediately upon discharge and so begins a cycle of admission and discharge.

S8 should be amended to require, where the voluntary patient was admitted following a request by the person's guardian under S7, that the decision for discharge is to be made by the treating team or the guardian if the person continues to lack decision making ability to make such a decision in their own interests.

The Public Guardian is frequently asked by hospitals to seek the admission of a patient as a voluntary patient for a patient who is in hospital already. This happens in situations where the hospital believes the patient will benefit from remaining in hospital but does not need to be an involuntary patient. However, the patient may not have the decision making ability to agree to be a voluntary patient.

Slattery J indicated that this was an inappropriate use of S7 of the MHA. How could the guardian seek the admission of a person who is already admitted? The Public Guardian disagrees with this position and suggests that the MHA be amended to ensure that a hospital can use the provision in this way if they believe that it is in the interests of the patient.

Forensic Patients

There can be confusion sometimes where a guardian is appointed with the same decision making authority as covered by Mental Health Review Tribunal (MHRT) orders for forensic patients, particularly if the guardian does not have access to the relevant MHRT order.

Orders for forensic patients are binding only on the person subject to the order, that is, the patient. They are not binding on anyone else, including government agencies such as NSW Health or Family and Community Services (FACS). Service providers are not bound by the order and are not obliged to provide services to the forensic patient. This issue will become more significant when the NSW Government no longer provides any direct services to people with disability. People with intellectual disability and no mental illness are sometimes forensic patients. Non-government service providers may be reluctant to provide services in the community to forensic patients and it is possible that certain types of services will not be funded by the NDIS.

The Public Guardian is frequently appointed for forensic patients to make decisions in areas not covered by the MHRT orders, to provide advocacy, to ensure that the patient's rights to access appropriate services are responded to and to intervene on the person's behalf in situations where their human rights are being infringed.

Question 6.3: Whether mental health laws should always prevail

(1) Is it appropriate that mental health laws prevail over guardianship laws in every situation?

No. For example, the Guardianship Act should prevail in relation to issues such as consent to medical treatment that is not of a psychiatric nature, or for voluntary patients.

7. Restrictive practices

Without proper lawful authority any implementation of restrictive practices could result in a crime or a tort being committed. Lawful authority could be in the form of consent from the person or from a substitute decision maker authorised to consent to restrictive practices. This is currently the situation in NSW.

The introduction of yet more separate coercive legislation such as in Victoria is unwarranted and has done nothing in that jurisdiction to reduce the use of restrictive practices or to necessarily improve the management of challenging behaviour generally. It has effectively shifted the emphasis from a rights based approach to regulation of restrictive practices to one of clinical supervision. It should be noted that the Public Advocate in Victoria retains some oversight of restrictive practices to ensure a person's human rights are not being breached.

A Public Advocate in NSW should have the power to intervene in situations where a person is being subjected to unlawful restrictive practices. This may occur in disability specific facilities such as aged care facilities, day programs and boarding houses or in the community. In such situations the Public Advocate may make an application for the appointment of a guardian in order to protect the person's rights or may utilise another option such as referral to Police or the NDIS Quality and Safeguards Commissioner. For further discussion see question 7 'advocacy and investigative functions', above.

OPG supports the creation of legislation that explicitly deals with restrictive practices. As restrictive practices are bound to issues of consent, OPG believes the legislation should sit within the Guardianship Act.

A clear definition of restrictive practices within the Act would create a common language and understanding of practices, which can vary greatly. OPG understands there may be under-reporting of restrictive practices in NSW due to differences of understanding about definitions of practices, duty of care and who can consent.

Question Paper 6: Remaining issues

1. Introduction

Question 1.1: Other issues

Are there any issues you would like to raise that we have not covered in Question Papers 1–6?

OPG believes NSW Trustee and Guardian should be renamed 'NSW Trustee'. In OPG's experience, the inclusion of 'and Guardian' in the Trustee's name is misleading to all sections of the community, as it creates an expectation that the Public Guardian and NSW Trustee are the same decision making body. The similar office names are particularly confusing for people with cognitive impairment, the very people the bodies are created to serve.

2. Objectives, principles and language

Please refer to OPG's Question Paper 3 submission regarding the principles of the Act.

Question 2.3: Accommodating multicultural communities

How should multicultural communities be accommodated in guardianship law?

OPG supports the accommodation of multicultural communities in guardianship law. The current general principles recognise the importance of person's cultural and linguistic 'environment'; multicultural community representatives could advise the Commission on the best way to update this language to reflect the importance of diversity and inclusion.

Question 2.4: Accommodating Aboriginal people and Torres Strait Islanders

How should Aboriginal people and Torres Strait Islanders be accommodated in guardianship law?

Question 2.7: Aboriginal and Torres Strait Island concepts of family

How could relationships be defined in the Guardianship Act 1987 (NSW) to take into account Aboriginal and Torres Strait Island concepts of family?

OPG supports the recognition of Aboriginal people and Torres Strait Islanders within the guardianship law. Aboriginal and Torres Strait Islander communities could best advise the Commission on ways to express respect for Aboriginal and Torres Strait Islander cultural diversity and contexts.

Question 2.5: Language of disability

(1) Is the language of disability the appropriate conceptual language for the guardianship and financial management system?

(2) What conceptual language should replace it?

Question 2.6: Language of guardianship

What terms should be used to describe participants in substitute and supported decision-making schemes?

OPG supports terminology that reflects the centrality of the person in the decision making process. The terms 'guardian' and 'guardianship' can suggest a protective, parental relationship. The term 'representative', for example, acknowledges that the person with cognitive impairment's wishes and interests are being represented rather than replaced. In recent years OPG has moved to using the term 'represented person' to describe a 'person under guardianship' but must describe the guardian using the language of the Act. People with disability will be able to advise the Commission on the most appropriate and preferred language in guardianship laws.

5. Age

Question 5.3: Appointing young people as guardians

Under what circumstances, if any, should the NSW Civil and Administrative Tribunal be able to appoint 16- and 17-year-olds as guardians?

OPG holds no particular view on this issue and it has not been raised with OPG as an area of need. We comment however that the proposal needs to be considered in the context of other possible changes to the Act. For example, if penalties are introduced or significant reporting requirements created OPG would have concerns about the preparedness for a young person to take on the role as well as the support available to them in doing so.

Question 5.5: Process for appointing parents as guardians

(1) Should NSW introduce a streamlined method for parents of adult children with profound intellectual disability to become their guardian when they turn 18 without the need for a NSW Civil and Administrative Tribunal hearing?

(2) What other mechanisms could be made available for parents to make decisions for an adult with profound decision-making incapacity?

OPG understands some parents and carers would like certainty around guardianship out of concern and love for their child with disability transitioning to adulthood. However OPG cannot support the proposal because placing a person under guardianship without a hearing displaces the person's rights and removes the opportunity for scrutiny around the need for a guardian, who the guardian should be and for how long, and whether less restrictive decision making supports should be sought.

The question paper reveals another area of difficulty with the proposal when it uses various terms for a person who might be eligible for a streamlined process: a person with 'profound

disability', 'lifelong disability', 'decision making incapacity' or 'significant decision making impairment'. These terms can be difficult to interpret and arbitrarily applied.

Currently, parents of adults with cognitive impairment can act as *persons responsible* for medical and dental consent and can apply to the NDIS to become a nominee for a participant. If other areas of decision making are needed the guardianship system can be accessed as a last resort.

7. Orders for guardianship and financial management

Question 7.1: A single order for guardianship and financial management

(1) Should there continue to be separate orders for guardianship and financial management?

OPG believes separate orders should be made for guardianship and financial management. Please see OPG's Question Paper 3 submission for further discussion.

Question 7.3: Resolving disputes between decision-makers

(1) How should disputes between decision-makers be resolved?

(2) Who should conduct or facilitate any dispute resolution process?

(3) What could justify preferring the decision of one substitute decision-maker over another?

Financial management decisions should be limited to the question of the affordability of the guardian's decision. Current arrangements allow for disputes to essentially be resolved by returning to NCAT for review, which appears to be effective.

8. Search and removal powers

Question 8.1: Search and removal powers

(1) Is there a need for provisions in the Guardianship Act 1987 (NSW) that empower police or NSW Civil and Administrative Tribunal employees to search premises and remove people deemed in need of protection?

(2) What changes, if any, should be made to these provisions?

OPG believes the reference to *NSW Civil and Administrative Tribunal employees* should be changed to *Office of the Public Guardian employees,* for whom the provision is relevant.

10. Handling personal information

Question 10.1: Access to personal information

In what circumstances should different decision-makers and supporters be able to access a person's personal, health or financial information?

Guardians need to be able to access information that is relevant to the exercise of their functions and they should be able to disclose information that enables them to exercise their functions. The general principles should guide the use of the represented person's information.

Question 10.2: Disclosure of personal information

(1) In what circumstances should various decision-makers and supporters be permitted to disclose a person's personal, health or financial information?

(2) In what circumstances should various decision-makers and supporters be prohibited from disclosing a person's personal, health or financial information?

OPG believes the represented person's views should be paramount in making decisions about the disclosure of their personal information. OPG makes further comment about privacy issues in Question Paper 4 submission at 8.10.

11. Supreme Court

The issue of cost is a significant disincentive for people wishing to have financial management orders made in the Supreme Court reviewed. OPG believes this disincentive could be addressed by all new financial management orders being reviewable or non-reviewable (rather than continuing) and all orders being reviewable by NCAT, including those made by the Supreme Court.